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Supreme Court of the United States.

OCTOBER TERM, 1930

No. 449.

E. S. SMITH,

Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF ON BEHALF OF APPELLANT.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF ON BEHALF OF APPELLANT.

Opinion Below.

The opinion of the Supreme Court of the State of Florida is reported in 99 Fla. 178, 128 So. 632 (1930), and appears in the Record at pages 43-47.

Jurisdiction.

The final mandate or judgment of the Florida Supreme Court was rendered on July 8, 1930 (R., 49), which referred to and made effective the Order of Reversal dated May 21, 1930 (R., 48). The application for appeal therefrom was presented, the order allowing appeal entered, and the citation issued and served on August 14, 1930 (R., 50-54).

Probable jurisdiction was noted by this Court (51 Sup. Ct. 89, 75 L. Ed. 114).

The claims advanced in the lower court, which are relied upon as the basis of this Court's jurisdiction, were that Chapter 13,700, Laws of Florida, 1929, is invalid on the ground of being repugnant to the Fourteenth Amendment of the Constitution of the United States, to Article I, Section 10, Paragraph 1, and to Article VI, Section 2, of the Constitution of the United States (R., 43-47). The rulings made were that said Florida statute is valid and not repugnant to the Constitution, or laws of the United States (R., 43-47).

The jurisdiction of this Court is invoked under the Act of February 13, 1925, 43 Stat. 936, entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeal and of the Supreme Court, and for other purposes", and appeared under Section 237(a) of the Judicial Code, as thus amended, providing, in part, that:

> "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error" (U. S. Code, Title 28, Sec. 344).

Under the former practice a writ of error would have been issued. This appeal is taken under Sections 861(a) and 861(b) of Title 28 of the United States Code, as amended April 26, 1928, and under Rule 46 of the Rules of this Court, effective July 1, 1928.

Statement of Case.

This case is before this Court on *habeas corpus* proceedings. The appellant, a private contract carrier, transporting merchandise for hire by motor vehicle over the public highways of Florida, was arrested on a warrant charging him with operating his truck and trailer without a certificate of public convenience and necessity, and without having made an advance payment of the mileage tax, in violation of Chapter 13,700, Laws of Florida, 1929 (R. 1-4).

The appellant, concededly, is a private carrier employed by the Great Atlantic & Pacific Tea Company under a single contract to haul merchandise from its Jacksonville warehouse to certain of its retail stores situated in towns and cities of Florida (R., 6, 8-9). Though the appellant hauls on a comparatively regular schedule, it is far from inflexible. The appellant is not a common carrier and never at any time has held himself out as a carrier to the public (R. 9).

After a preliminary hearing before a Justice of the Peace, he was committed to the custody of the Sheriff of Duval County, Florida, the appellee herein, and bound over to the criminal court of record of that county (R., 1-5, 29-30).

Petition for a writ of *habeas corpus* was addressed to the Circuit Court of Duval County (R., 1-4).

On the authority of *Frost* v. *Railroad Commission of California*, 271 U. S. 583, and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, the Court ordered the release of the appellant, holding that he was being illegally detained under an unconstitutional statute, which, according to the plain and natural meaning of its provisions, required a private carrier to assume the duties, burdens and obligations of

a common carrier and become subject to the same rules and regulations (R. 31-35).

On writ of error to the Supreme Court of Florida, the order of the Circuit Court was reversed, the Court ruling, in effect, that the appellant was under lawful arrest in the custody of the appellee (R. 48).

In reaching this conclusion, the Supreme Court of Florida held that Chapter 13,700, Laws of Florida, 1929, as construed and applied to the appellant, was constitutional. The Court specifically ruled that notwithstanding the status of the appellant as a private carrier under a single private contract, he was nevertheless subject to those provisions of Chapter 13,700, requiring him to obtain a certificate of public convenience and necessity and pre-pay a mileage tax before using the public highways.

Specifications of Error.

The ultimate error assigned is that the Supreme Court of Florida erred in holding as a matter of law that Chapter 13,700, of the Laws of Florida, 1929, as construed and applied to this appellant, was a lawful and constitutional statute. The detailed specifications of error (all of which are intended to be urged here) are set forth in the assignments of error (R. 50-53).

The Statute Involved.*

Chapter 13,700, laws of Florida, 1929, provides for the supervision and regulation by the State Railroad Commission

* The text of the statute is set forth in full in Appendix A (*infra*, pp. 59-90).

and also for the taxation of auto transportation companies engaged in the business of transporting persons or property over the public highways of the State.

In Section 1(h) the term "auto transportation company" is defined to mean anyone who owns, controls, operates or manages a motor vehicle "used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route". The term "motor vehicle" is defined to mean all motor vehicles "used upon the public highways for the transportation of persons or property for compensation as common carriers". Excluded from both these definitions are, among others, those "engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the point of production to the assembling or shipping point en route to primary market * * *".

By Section 2 no auto transportation company is permitted to "operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future *public** convenience and necessity requires or will require such operation".

By Section 3 the Railroad Commission is empowered after a hearing to "issue a Certificate of Public Convenience and Necessity, as prayed for, or refuse to issue the same, or * * * may issue the same with modification or upon such terms and conditions as in its judgment the *public* convenience and necessity may require". In applying for a certificate, the

* Italics ours, unless otherwise noted.

applicant is required to file his *tariffs* and *time schedules* of operation.

By Section 5 the Railroad Commission is "vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company"; to prescribe uniform systems of accounts, to require filing of annual reports and other data; "and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the travelling and shipping public".

By Section 6 an auto transportation company is required to file tariffs and time schedules with the Commission; and "to keep open for public inspection at designated offices so much of said schedules of rates and fares and time schedules" as the Commission deems necessary. It is made unlawful for any transportation company to collect or receive a greater or less rate for services rendered than the charge set forth in the schedules on file with the Commission.

By Section 13 a violation of any provision of this Act or a failure to comply with any order of the Railroad Commission is made a misdemeanor punishable by fine, or by imprisonment, or by both.

Under Section 14 every transportation company which has been granted a Certificate of Public Convenience and Necessity is required to pay a mileage tax of one cent per mile on each one of its motor vehicles of the capacity of the two motor vehicles operated by the appellant (R. 14-15); and the Comptroller of the State is directed to collect from each holder of a certificate the sum of $75 every three months

from and after the issuance of the certificate, as an advance payment upon this mileage tax.

In sections 15 and 18 are set forth the uses to which the moneys collected in the form of the mileage tax shall be put.

Section 15 provides that 5% of the moneys so collected shall be used "to cover the expenses of the administration of this Article", by the Railroad Commission; the remaining 95% to go to the several counties over whose highways the auto transportation companies operate. "To each county whose highway system is used" shall go "its part of said balance in the proportion that the bus mileage traveled over its highway system bears to the entire bus mileage traveled"; said moneys to be used "to pay the interest on and provide a sinking fund to retire the county bonds issued for the purpose of constructing the state system or the county system of good roads within said county or to be used by [the] county commissioners * * * for said purpose."

Section 18 provides, in the event that Section 15 be unconstitutional, "such balance of such proceeds above described shall be paid into the state road license fund and shall be used for the construction and maintenance of state roads under the direction of the State Road Department."

Summary of Argument.

I. The Florida staute under review is substantially identical with the California statute, which was held unconstitutional by this Court in *Frost* v. *Railroad Commission of California,* 271 U. S. 583. In the instant case, as in the *Frost* case, the state courts construed the statutes as regulations of the business of transportion for compensation. This determination was essential, in the present case, to sustain the statute under Section 16 of Article III of the Constitution of the State of Florida, which provides that no bill shall embrace but one subject and matter properly connected therewith; and that the subject matter of an act be briefly embraced in its title. The conclusion of the Florida court that the statute here under review "does not require private carriers to become common carriers" is not binding on this Court, being as it is a mere legal conclusion, which is always a proper subject of review. With respect to the provisions requiring a certificate of public convenience and necessity, no machinery is set up to deal with private carriers separately from common carriers. In order to obtain a certificate the appellant is required to make a showing that public convenience and necessity demand his operation, just as a common carrier. His right to engage in the business rests within the discretion of the Commission: the test is the adequacy of transportation facilities by motor carriers in his locality. For a certificate "is designed primarily to promote good service by excluding unnecessary competing carriers"; it is a regulation for "the prohibition of competition". *Buck* v. *Kuykendall,* 267 U. S. 307, 315. In applying for a certificate, the appellant must file his rates, tariffs and schedules, and the certificate may be denied him in the interests of the shipping public. This, we submit, constitutes a dedication of "his property to the quasi-public use of public

transportation", notwithstanding any ruling of the Florida Supreme Court to the contrary. With but a single exception, the state courts have held that a state has no power to require a certificate of a private carrier such as the appellant. The exception based its decision on the proposition that the certificate there was a regulation of the highways, not a regulation of the business of carriage. To this Court's attention we commend an excellent analysis of *"Regulation of the Contract Motor Carrier Under the Constitution"*, by Messrs. Brown and Scott, 44 Harv. L. Rev., 530.

II. As written, the statute is plain and clear enough, encompassing as it does both private and common carriers within the scope of all of its provisions; and so read is unconstitutional under the *Frost* decision. In its ineffectual attempt to save this statute from the fate of the California statute, the Florida Court ruled, with obvious violence to the plain wording of the statute, that some provisions, unspecified in the opinion, are *legally* applicable only to private carriers, others solely to common carriers. No designation, guide or standard is furnished for this classification of the statutory requirements. By such construction the statute, otherwise definite, becomes so vague and indefinite as to deprive appellant of his liberty and property without due process of law. *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82, 98; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518.

III. Assuming, *arguendo*, that the legal effect of Chapter 13,700, Laws of Florida, 1929, is not to subject the appellant to the same obligations and regulations as common carriers, nevertheless, the private business of the appellant, as a contract carrier, is not subject to certificate control as set out in the Florida statute. Certificate regulation is a regulation of the business of people who use the highways in transport-

ing goods for hire, and not a regulation of the use of the highways. The two powers are separate and distinct. *Buck* v. *Kuykendall* (*supra*); *Frost* v. *R. R. Comm.* (*supra*). Only those businesses "affected with a public interest" can be subjected to the drastic regulation by certificate which goes to the length of prohibition. The mere fact that the appellant uses the highways in the performance of his business undertaking does not "affect his business with a public interest". *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *Frost* v. *R. R. Comm.* (*supra*); *Mich. Pub. Util. Comm.* v. *Duke* (*supra*). The appellant is admittedly not a common carrier; nor is his business clothed with a public interest. Such a private undertaking fails to satisfy any of the tests which commonly brand a business as one affected with a public interest. *Tyson* v. *Banton*, 273 U. S. 418, 434. Certainly the public is not interested in the service rendered by the appellant. No one but the Great Atlantic & Pacific Tea Company is dependent upon his business or concerned with respect of its maintenance. This statute is not a regulation of a private carrier *qua* private carrier for reasons above shown.

IV. Assuming *arguendo* that the State of Florida has the power to require a certificate of public convenience and necessity of the appellant as a condition precedent to his use of its highways, the appellant cannot be subjected to the exercise of that power by a statute which, on its face, and as construed, is patently discriminatory. The classification which we particularly challenge is that which exempts carriers who transport between fixed termini or on a regular route, agricultural, horticultural, dairy and fish products. As a regulation of the business of transportation, the only possible end certificate regulation might achieve is to secure adequacy and continuity of service to those who ship by motor carrier.

Neither the type of commodities nor the needs of the persons served by these exempt carriers furnish a reasonable ground on which to rest this classification. Similar exemptions were held invalid in *Franchise Motor Freight Association* v. *Seavey*, 196 Cal. 77, 235 Pac. 1000. Even viewed as a highway measure, for the purpose of conserving the roadbeds and for promoting more safety and less congestion on the public roads, which most certainly the statute is not, the act, nevertheless, remains discriminatory. The classification bears no conceivable relation to the conservation of the public roads of Florida. The ordinary criteria of the size and weight of the vehicles are not considered; the extent of the use is not the test; and even the content of the load in the last analysis is unimportant. If the object of certificate control be in the interest of less congestion and more safety upon the public highways, those trucks under certificate control are no more of a menace, and, in fact, less in many instances, than the trucks outside, if size, weight and frequency of use be any criteria. So far as congestion goes, the number of vehicles of the exempt class operating between fixed termini or on a regular route over the highways of Florida greatly outnumbers those within the operation of the statute. The instant statute whether viewed as a regulation of the business of private carriage, which it admittedly is, or as a highway measure, arbitrarily discriminates between private carriers operating between fixed termini or on a regular route without reasonable ground to justify such classification. There is no difference which bears a just and proper relation to the attempted classifications. The exemptions are mere arbitrary selections.

V. Whether the levy under this statute be regarded as a tax or as a toll, it is patently discriminatory and constitutes

a denial of the equal protection of the laws. The object of this tax is to provide funds to pay for the past and future construction of a state system of roads and its maintenance. Its underlying purpose is to obtain reimbursement from those who use the public roads in the business of transporting for hire. Using the cost to the State as the yard-stick, there is no difference on which to rest this classification. Usage of the public roads by carriers within the statute is no more an expense to the State than usage by those exempt. The classification bears no relation to the wear and tear on the highways occasioned by the vehicles of either group. Weight, size, content of load, and extent of use are not the determining bases. Though the exemptions may indirectly favor the farm, dairy and fishing interests, that of itself, will not sustain a classification otherwise arbitrary. See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563; *Lossing* v. *Hughes* (Tex. Cr.), 244 S. W. 556. The instant case is distinguishable from the case of *Bekins Van Lines, Inc.*, v. *Riley*, 280 U. S. 80, 82.

VI. The so-called mileage tax imposed by Chapter 13,700, Laws of Florida, 1929, is not a tax, but a toll exacted by the State for the use of all its public highways and is, therefore, invalid, conflicting, as it does, with the Federal Highway Act, Chapter I, Section 9, which provides that all Federal aid highways "shall be free from tolls of any kind". The appellant hauls over many Federal aid highways. The Supreme Court of Florida has held that the state could collect the so-called "mileage tax" from the appellant as "a license tax". The fact that the state court characterized the levy as a tax is not controlling. If, in substance the exaction is a toll, it must be so regarded. The present levy is a "toll" within the rule stated in *Carley & Hamilton* v. *Snook*, 281 U.

S. 66, 73-74. There is no levy unless a public road is used, and the liability for such use attaches instantly. The imposition is based entirely upon the extent of the use, and bears no relation to the business of the carrier. An advance payment of $75 has to be made every three months. And adjustments are then made. A toll is no less such because cash payment at the time of use is not demanded nor made. *Jordan & Skaneateles, Pl. R. Co.* v. *Morley*, 23 N. Y. 552; *Pennsylvania Coal Company* v. *Delaware & Hudson Canal Company*, 10 N. Y. (1 Keyes) 72, 80-81. Nor because it is collected by the state. *Huse* v. *Glover*, 119 U. S. 543, 548. The present imposition is distinguishable from the registration fees in *Carley & Hamilton* v. *Snook* (*supra*), and is a newly devised revenue plan, not a "well recognized type of taxation" existing at the time of and prior to the Federal Highway Act of 1921 (p. 74). It is just such a levy as Congress must have contemplated the states would attempt under the guise of taxation, and for that reason it expressly prohibited the imposition of *"tolls of any kind"*.

VII. The so-called "Mileage Tax" is so arbitrary and oppressive as to be confiscatory. The Record discloses that private carriers will be forced out of business.

VIII. Chapter 13,700, Laws of Florida, 1929, impairs the obligation of appellant's contract and also deprives him of his liberty of contract.

POINT I.

Chapter 13,700, Laws of Florida, 1929, requires the appellant, admittedly a private carrier, to dedicate his property to the quasi-public use of public transportation, thus taking his private property for public use without just compensation, and depriving him of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Florida statute under review is substantially identical with the California statute, which was held unconstitutional by this Court in *Frost* v. *Railroad Commission of California*, 271 U. S. 583. The two statutes are set out in parallel columns in Appendix A, for the purpose of illustrating the striking similarity in their phraseology, purpose and effect.

In the *Frost* case, as here, the controversy arose over the right of a State to require a certificate of public convenience and necessity from a private carrier. In the *Frost* case, the private carrier refused to obey an order of the Railroad Commission ordering him to desist from operating his truck without such a certificate. In the instant case, the appellant was arrested for operating his truck without a certificate of public convenience and necessity in violation of the statutory provisions. In both cases, the Railroad Commissions were empowered to grant certificates of public convenience and necessity or to deny the same or to issue them on such terms and conditions as they saw fit. In both cases, regulation of private carriers by certificates of public convenience and necessity was a phase of regulation inextricably interwoven

with other regulatory provisions respecting rates, tariffs and schedules.

In the *Frost* case, the Supreme Court of California construed the statute as a regulation of the business of those who engaged in transportation of goods for compensation on the public highways.

In the instant case likewise the Supreme Court of Florida held that the subject of the act now under review was the regulation of the business of transportation for hire. This determination was essential to sustain the statute under Section 16 of Article III of the Constitution of the State of Florida, which provides that a bill shall embrace but one subject and matter properly connected therewith; and that the subject matter of an act be briefly embraced in its title. In the court below the point was raised and strenuously argued that Chapter 13,700, Laws of Florida, 1929, violated this provision of the Constitution of Florida, the contention being that the statute in question embraced provisions regulating the business of transportation as well as regulations of the use of the highways. That the regulation of the business of transporting persons or goods for hire is one subject, and the regulation of traffic on the public highways so as to insure safety of travel or to preserve the public highway are separate and distinct subjects was plainly recognized by the Supreme Court of Florida and disposed of in the following language:

> "The title of the act does not express and the body of the act does not embrace, more than one general subject matter of legislation and matter properly connected therewith; therefore, the act does not violate Section 16 of Article III of the Constitution. The title of the act is not misleading. The tax levy is matter properly connected with *the subject of the regulation of the business that is expressed in the title and covered by the statute and the levy but not confined to the expenses of regulation*" (R. 45).

The initial decision of the Supreme Court of Florida therefore was that the subject of the statute was "the regulation of the business * * * of transportation for compensation on the public roads of the State." It was essential for the Court to make this primary determination in order to sustain the constitutionality of the act. Under Florida practice, Section 16 of Article III is frequently invoked, and the courts of Florida, in many cases, have held statutes embracing more than two subjects unconstitutional.*

In another part of the opinion of the Court below there appears an involved sentence which might, at first glance, seem to be in conflict with the express holding of the Court:

> "The requirements as to procuring certificates of convenience and necessity for doing business on the highway and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State in the exercise of police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes" (R. 46).

An analysis of the apparent conflict in the opinion of the Florida court reveals that, in fact, it does not exist. The court held: First, the regulation of the business of transportation for hire was the subject of the Act; Second, the tax levy was matter properly connected with the subject; Third, a certificate of convenience and necessity for doing business on the highway and the imposition of a tax upon such business could reasonably be applied to private carriers

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* See

State v. *Sullivan*, 99 Fla. 1070; 128 So. 478;
Smith v. *Chase*, 91 Fla. 1044; 109 So. 94;
Wade v. *Atlantic Lumber Co.*, 51 Fla. 623; 41 So. 72;
State v. *Burns*, 38 Fla. 367; 21 So. 290

for compensation in the exercise of the police and taxing powers of the state.

Thus the question presented in this case is practically the same as that presented in the *Frost* case. With this difference only: in the *Frost* case, the Supreme Court of California concluded that the legal effect of the provisions of the Act was to subject a private carrier to the same rules and regulations as a common carrier, thus constituting a dedication of private property to the *quasi-public* use of public transportation; whereas, in the instant case, the Florida court concluded that the statute here under review "does not require private carriers to become common carriers", even though the Court specifically held that a certificate of convenience and necessity as set out in the statute could be reasonably required of a private carrier as a condition precedent to his use of the highways.

We respectfully submit that this Court is not bound by any such construction; that such construction is a conclusion of law, properly reviewable here. This is elementary and hardly warrants comment. The appellee, however, will undoubtedly urge that this Court is bound by the State Court's declaration that the statute does not require the appellant to dedicate his private property to a *quasi-public* use. We submit, however, that, it is within the power of this Court to review such a legal conclusion, just as much as it is within the power of this Court to overrule a State court's finding that a statute is not discriminatory when, as a matter of law it is; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; just as much as it is within the power of this Court to inquire, regardless of a State court's finding, whether or not a business is affected with a public interest. *Wolff Packing Company* v. *Industrial Court*, 262 U. S. 522; just as much as it is within the power

of this Court to determine the nature of a levy, whether a tax or penalty, notwithstanding the fact that the state court has construed it to be a tax. *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346, 348.

As we understand the rule, this Court is bound by a State court's construction only as to the meaning of a statute and to whom it applies, and not by any legal conclusions deduced therefrom.

So with respect to the instant case, under the familiar rule, this Court is bound by the State court's construction only as to the holding that this private carrier is within the scope of the statute; that the statute is a regulation of the business of transportation for compensation; and that a so-called "mileage tax" and a certificate of public convenience and necessity can be required of this appellant.

As to the nature and legal effect of the certificate requirement and other statutory provisions regulating private carriers, a review by this Court is not only proper, but, in substance, is the justification and foundation of its jurisdiction.

The Supreme Court of Florida has held this much at least: that the State of Florida can require of appellant a certificate of convenience and necessity as set forth within the four corners of the enactment. This, if it means anything, means that the appellant is subjected to the power of the Commission to "issue a certificate of *public* convenience and necessity as prayed for or refuse to issue the same or * * * may issue the same with modifications or upon such terms and conditions as in its judgment the public convenience and necessity may require." In applying for a certificate the applicant is required to file his tariffs and time schedules of operation. He must appear at a hearing before the Railroad Commission. Upon such hearing, the

Commission shall issue or refuse the certificate on such terms and conditions as in its judgment the *public* convenience and necessity may require. The statute lays down certain criteria which the Commission must take into consideration in determining whether or not a certificate shall issue, among others, "general standard of service maintained during this period; the reliability of the applicant and his sense of responsibility towards the *public* as shown during the period of his operation; * * * the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory and any other matter tending to qualify or disqualify him as a *common carrier.*" The Commission shall grant a certificate, however, "only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission."

No machinery is set up to deal with private carriers separately from common carriers. The statute makes no distinction between private and common carriers with respect to the certification. In fact, by the express terms of the statute, one of the determinative factors to be considered in passing upon an application for a certificate is that the applicant make a showing which would qualify him "as a *common carrier.*"

The right to engage in the business rests within the discretion of the Commission: the test is the adequacy of transportation facilities by motor carriers in that locality.

To condition an individual's right to engage in the business of a private carrier under contract with a single shipper upon a showing that public convenience and necessity demands such service presents on its face an anomaly and is, in fact, a subversion of a legal device which has hitherto been used exclu-

sively in the regulation of common carriers or businesses affected with a public interest.

The origin of "public convenience and necessity" may be traced to the days when state statutes imposed a duty upon localities to build highways, if demanded by "public convenience and necessity". *Fenwick Hall Co.* v. *Saybrook*, 69 Conn. 32. The formula was incorporated in the regulation of public utilities—*Re Shelton Railroad*, 69 Conn. 626; and expanded so as to prohibit the establishment of such enterprises unless necessary for the public convenience. The underlying purpose of such statutes is to assure adequacy and continuity of service by preventing ruinous competition between those who serve the public.

As lucidly stated by Mr. Justice Brandeis in *Buck* v. *Kuykendall*, 267 U. S. 307, 315, a certificate of public convenience and necessity

> "Is not regulation with a view to safety, or to conservation of the highways, but the *prohibition of competition*. It determines not the manner of use, but the persons by whom the highways may be used * * * [it] is designed primarily to promote *good service by excluding unnecessary competing carriers*."

By the use of this device the State of Florida, as the Court below has ruled, can regulate to the extent of prohibiting the private business of the appellant; can deny him the use of its highways unless he, as a condition precedent, submits to certificate regulation with its attendant requirements of filing rates, tariffs, schedules and making a showing that public convenience and necessity demand his operation.

This, we submit, constitutes a dedication of "his property to the quasi-public use of public transportation" [*Frost* v. *Railroad Commission of California* (p. 591)], notwithstanding any ruling of the Florida Supreme Court to the contrary.

The effect of thrusting a private carrier bodily into regulatory machinery geared for the regulation of common carriers is ably discussed in a leading article in the recent February issue of the Harvard Law Review, Brown and Scott, *"Regulation of the Contract Motor Carrier under the Constitution"*, 44 Harv. L. Rev. 530. The authors examine critically the whole question here involved, and we commend most earnestly their analysis to this Court. The learned authors there ask (pp. 543-544):

> "What is the situation of the private carrier when he becomes a part of such a system? A person desiring to operate under a single contract to haul goods for a corporation or an association still is proposing to transport property for hire. He must, under the ordinary statute, apply for a certificate of convenience and necessity. The test for the grant or refusal of such a certificate is the adequacy of existing service to meet the public demand. If the applicant is to remain a private carrier, though subject to the act, this test is manifestly so inapplicable as to be absurd. The public in general makes no demand for this applicant's service. Such a demand, if made, would be useless unless the applicant ceases to be a private carrier, since by hypothesis he does not hold himself out to serve, and can not be made to serve, any but the party to his single contract. His service will not, if he remains a private carrier, be offered to the public at large. The grant of the certificate, if made, will produce no additional service to the public in general, nor does the present existence of common-carrier service meet the demand which the applicant's customers, for reasons of their own, have manifested for his service.
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> In short, the principle which underlies the existing forms of regulation is wholly inapplicable to the private carrier. It was not formulated for the purpose of controlling individual contracts to serve individual customers. It was designed to equalize, over a period of time, the need of an entire community for a given type of service and the supply of such service. A contract carrier who can not be forced, even though certificated, to respond to a given public demand has no place in such

> a system. The demand for service to which he responds is not a public one, statistically calculable. It is a single private demand or series of private demands, the recurrence of which can not be predicted and response to which can not be compelled."

They then point out (pp. 445-446), as is the situation here, that

> "In no case has a separate system of control been set up for the private carrier. Ordinarily the principal features of the act are exactly the same as if common carriers alone were included. Regulatory provisions which destroy the very essence of the private carrier's status are made applicable to him as to common carriers."

and conclude (p. 446) that

> "What was true of the California statute is equally true of every statute in which the device has been followed. For the reasons given by the Supreme Court in the *Frost* case all are unconstitutional." [By "device", the authors meant, as stated in a footnote, a regulation of the business of contract carriers by a certificate of public convenience and necessity.]

With but a single exception, the state courts have held that a state has no power to require a certificate of a private carrier such as the appellant.* *Hissem* v. *Guran*, 112 Ohio St. 59; 146 N. E. 808; *Mooney* v. *Tuckerman*, 50 R. I. 37, 144 Atl. 891; *Weaver* v. *Public Service Commission of Wyoming*, 40 Wyo. 462, 278 Pac. 542; *Big Bend Auto Freight* v. *Ogers*, 148 Wash. 521, 269 Pac. 802; *Jones* v. *Ferguson*, 181 Ark. 522, 27 S. W. (2) 96; *Griffin* v. *Murphy*, 51 S. D. 50, 211 N. W. 804; *Purple Truck Garage Company* v. *Campbell*, 119 Or. 484, 250 Pac. 213; *Davis* v. *Metcalf*, 131 Wash. 141, 229

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* For a complete digest of all state statutes fully annotated, see, Brown and Scott, *Regulation of the Contract Motor Carrier Under the Constitution*, Appendix, 44 Harv. L. Rev., at pages 568-571.

Pac. 2; *State* v. *Nelson*, 65 Utah, 457, 238 Pac. 237; *State* v. *Smith*, 31 Ariz. 297, 252 Pac. 1011, 1012; *Towers* v. *Wildason*, 135 Md. 677, 109 Atl. 471.

The sole exception is the Supreme Court of Oklahoma in *Barbour* v. *Walker*, 126 Okla., 227, 259 Pac. 552. It is significant to note that the Oklahoma Court based its decision on the proposition that the certificate regulation there challenged (contrary to the one under discussion here) was a regulation of the highways and not a regulation of the business of private carriage.

A few courts have held that a state may require a certificate of *quasi* common carriers. *Rutledge Cooperative Association* v. *Baughman*, 153 Md. 297, 138 Atl. 29; *Southern Motors* v. *Perry* (D. C. N. D. Ga.), 39 Fed. (2d) 145; *Georgia Public Service Commission* v. *Saye & Davis Transfer Co.*, 170 Ga. 873, 154 S. E. 439. The last two courts in construing the Georgia statute indicated, however, that a certificate could be demanded of a private carrier. But within the past three months, in fact, so recently that their opinions have not as yet been reported, both the last two courts have reversed themselves and have construed the Georgia act as inapplicable to contract carriers. *Johnson Transfer & Freight Lines* v. *Perry* [(D. C. N. D. Ga.), a federal three-judge court, Equity No. 598]; *McIntyre* v. *Harrison* [Supreme Court of Georgia, No. 7887].

We respectfully submit that the legal effect of Chapter 13,700 with respect to this appellant is to require him to dedicate his private "property to the quasi-public use of public transportation" contrary to the principles announced by this Court in *Frost* v. *Railroad Commission of California* (*supra*), and *Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. 570.

POINT II.

Chapter 13,700, Laws of Florida, 1929, as construed by the Supreme Court of Florida, is so vague and indefinite as to deprive the appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

With respect to the other provisions in the statute the Supreme Court of Florida, in its attempt to circumvent the decision of this Court in the *Frost* case, strained to reach a wholly forced construction, stating, with obvious violence to the plain wording of the statute, that the Legislature intended only those provisions, which were "legally applicable to private carriers", to be applicable to private carriers; and those provisions which were "legally applicable only to common carriers to be applied to such common carriers" (R. 46). This, despite the fact that the whole statute is framed to regulate "auto transportation" companies. This, despite the fact that the term "auto transportation company" is specifically defined to include both common and contract carriers. This, despite the fact that each and every provision of the statute is directed and addressed to auto transportation companies, as so defined, to private and public carriers alike and without distinction.

Undoubtedly the Florida Court was in a dilemma. As written, the statute is plain and clear enough encompassing, as it does, both private and common carriers within the scope of all its provisions and, so read, is unconstitutional under the *Frost* decision. In trying to save this statute from the fate of the California Statute, ineffectual though it was, the

Florida Court is impaled upon the other horn of the dilemma. As construed by the State Court, the statute, otherwise definite, becomes so vague and indefinite as to deprive the appellant of his liberty and property without due process of law. By such construction the appellant, and others similarly situated, are not informed as to what standard of conduct is required of them lawfully to pursue their business; no norm of conduct is given them by which they can measure the legality of their acts.

Section 13 of Chapter 13,700, Laws of Florida, 1929, makes it a crime for anyone to violate any provision of the Act. The entire Act, then, must be viewed in the light of a penal statute.

Penal provisions, in order to satisfy the first essential requirement of due process under the Fifth or under the Fourteenth Amendment, must be so clearly and definitely expressed that an ordinary man can determine in advance whether a contemplated act is within or without the law. On the other hand, they must not be so broad and elastic in their terms as to compel a man to guess at his peril whether his act is in violation of them. In short, if deviation from a standard provokes a penalty, the standard must be definitely fixed. *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 89; *Weeds, Incorporated* v. *United States*, 255 U. S. 109; *Cline* v. *Frink Dairy Company*, 274 U. S. 445, 454; *Connally* v. *General Construction Company*, 269 U. S. 385; *International Harvester Company* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *American Seeding Machine Company* v. *Kentucky*, 236 U. S. 660, *United States* v. *Capitol Traction Company*, 34 D. C. Appeals, 595; *Louisville & N. R. Company* v. *Railroad Commissioner of Tennessee*, 19 Fed. 679; *Tozer* v. *United States*, 52 Fed. 917; *Common-*

wealth v. *Louisville & N. R. Company,* 46 S. W. (Ky.) 700. By the same token, a statute, otherwise definite is unconstitutional if made vague and indefinite by construction. *United States* v. *Reese,* 92 U. S. 214, 221; Trade Mark Cases, 100 U. S. 82, 98; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 517.

In the latter case, the late Mr. Chief Justice Taft, said, on page 522:

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity".

And this rule should be most strictly applied to statutes which create new offenses, that is, where the sovereign state for the first time is attempting to punish a course of conduct which theretofore was recognized as legal. *United States* v. *Reese, supra; United States* v. *Brewer,* 139 U. S. 278; *United States* v. *Sharp,* Pet. CC. 118, 122 (Fed. Case No. 16,264); *Northern Pac. Ry. Co.* v. *U. S.,* 213 Fed. 162.

As the statute now stands construed, a private carrier is without guide as to what course to pursue in order to carry out his contract and earn his living. If he guesses wrong, he is faced with a jail sentence, a heavy fine, or both. If he guesses right, he will be vindicated only after endless litigation, and burdensome expense. If he supinely submits to all the demands of the statute, he gives up his inherent constitutional rights. As it is, he does not know what is required of him. Shall he give a bond in such amount as the Commission may fix to indemnify the public and those whose property he carries against damages for his negligence? Are his rates and charges subject to the supervision of the Commission and his whole business conduct to

such rules and regulations as the Commission may prescribe, which rules and regulations are by the statute presumed in advance to be not only within the power of the Commission, but such "as ought to have been made in the premises"? Is he permitted to deviate from the route described in his certificate only in case of a compulsory detour or to points not on the exclusive route of any other certificate holder? Must he seek the approval of the Commission for each new contract he makes with his employer by which his compensation is changed or modified? To these and many like questions the opinion of the Supreme Court of Florida furnishes no answer. Yet if he is subject to the act as written, the reply can only be "Why not"?

There is very little difference between such a statute and the Chinese Penal Code referred to by Judge Brewer, later Mr. Justice Brewer, in *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876:

> "In this [Lieb. Herm., 156] the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows'".

POINT III.

Chapter 13,700, Laws of Florida, 1929, being a regulation of the business of transportation, and not a highway measure, the State of Florida cannot subject the appellant's business, unaffected, as it is, "with a public interest" to certificate regulation in contravention of the Fourteenth Amendment to the Constitution of the United States.

Assuming, *arguendo*, that the legal effect of Chapter 13,700, Laws of Florida, 1929, is not to subject the appellant to the same obligations and regulations as common carriers, we, nevertheless, submit that the private business of the appellant, as a contract carrier, is not subject to the certificate control set out in the Florida statute.

We are not here concerned with the power of the State of Florida to regulate traffic on its highways. The power of a State to impose reasonable regulations upon the use of the highways by private carriers is not questioned. Special licenses may be required; maximum size of equipment, breadth of tires may be specified, together with safety devices and speed limits, insurance and safety bonds; all conducive to the public welfare by promoting safety on or conservation of public highway.

But the power of the State of Florida to regulate the business of appellant's private undertaking, as a business, raises a different series of questions.

That the statute now under review is a regulation of the business of transporting for hire and not a highway measure is no longer open to question. The Supreme Court of Florida has expressly held it to be such (*supra*, pp. 15-17). And

an analysis of the function and genesis of certification shows that it is not a highway measure.

The power of a State to require a certificate of public convenience and necessity is derived not from the power to regulate the use of the public highways but rather from the power to regulate the business of those who are engaged in using them. *Buck* v. *Kuykendall* (*supra*). The two powers are wholly unrelated, and flow from separate and distinct sources. The *Frost* case is conclusive on this point (pp. 593-4).

Whether or not the state has the power to regulate any particular business, for economic reasons, in contradistinction to traffic purposes, depends in the last analysis, upon the character of the business to be regulated, the test always being whether or not the business in question is "affected with the public interest".

In *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 434, this Court after an exhaustive analysis of the pertinent cases framed the test as follows:

> "A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."

The appellant is concededly a private carrier; he has never held himself out as a common carrier; he has never "devoted his property to a public use". Certainly the public is not interested in the service rendered by the appellant. No one but the Great Atlantic & Pacific Tea Company is dependent upon his business or concerned in respect of its maintenance. Such a private undertaking wholly fails to satisfy any of the tests which commonly brand a business as one affected with the public interest.

The mere fact that the appellant uses the highways in the performance of his business undertaking does not "affect his business with a public interest". To the contrary are the express holdings of this Court in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *Michigan Public Utilities Comm.* v. *Duke* (*supra*); *Frost* v. *Railroad Commission of California* (*supra*).

Inasmuch as the business of the appellant is unaffected with a public interest, the State of Florida is without power to impose on him the extraordinary regulation of certification, drastic even to the lengths of prohibition. This is no mere licensing requirement. This does not involve a question of registration solely. This is not a regulation of a private carrier *qua* private carrier, as suggested by Mr. Justice Sutherland in the *Frost* case (p. 592). The system for certificate regulation provided for in Section 13,700 does not segregate the method and manner of certifying private carriers from common carriers. Even as construed by the Supreme Court of Florida, the test for one is the same as for the other—public convenience and necessity, the adequacy of existing service. The one vital issue is whether or not an individual engaging in a business strictly private can be forced to abandon his means of livelihood in the cause of adequacy and continuity of service to the public. So to deny him his earning power in this legitimate line of business is as much a requirement that he dedicate his property to the public use as would be the confiscation of his trucks themselves.

There are no abuses here which call for this drastic regulation. The demand for regulation by certificate or, in fact, any regulation whatsoever, is not made by the shipper* or by the business world,* or by those with whom the contract

* See I. C. C. Hearings, Docket 28,400.

or common carrier deals. The only apparent beneficiaries are the railroads.

Surely, a certificate of public convenience and necessity cannot be constitutionally required of appellant with the effect of prohibiting, in the interest of competing carriers, the prosecution of his enterprise. To extend the monopolies conferred upon public service companies, by forbidding undertakings, neither noxious nor detrimental to the public welfare, is a serious invasion of the fundamental rights of an individual. The fact that the appellant may be employed by one who is a potential customer of a common carrier of freight does not warrant his exclusion for the benefit of competing carriers. If that doctrine is sound, it could be invoked, when carried to its logical conclusion, to force individuals to ship by a common carrier and not by their own trucks.

The conclusions of Messrs. Brown and Scott are so ably stated that we take the liberty to quote again from their article:

> "Considered individually, therefore, the provisions both for the regulation of rates and practices and for the requirement of certification are regulations of the business, and, in application to contract carriers, invalid, since the business of those carriers is not affected with a public interest. In practice, however, they are not to be regarded individually, but as complementary and essential components of a unified regulatory system. A statute providing for certification intended to result in a limitation of competition, tending toward monopoly, plainly must embrace rate regulation as a protection to the public. If it be assumed, *arguendo*, that a constitutional method of exclusion of some of those seeking to engage in the business of contract carriage could be devised, it is a necessary corollary that regulation of rates and practices must accompany it. Otherwise the exclusion of free competition, if effective, would be mis-

chievous. One consequence is that in the case of a statute embracing both rate regulation and certification, the failure on constitutional grounds of the provisions regarding rates and practices must, as a matter of necessary interpretation, carry down with it the certification provisions" (44 Harv. L. Rev., 565, 566).

We submit, therefore, that the State of Florida cannot subject the appellant's business to certificate regulation as required by Chapter 13,700, Laws of Florida, 1929, and in consequence the statute is unconstitutional, violating as it does the Fourteenth Amendment to the Constitution.

POINT IV.

To require a certificate of public convenience and necessity of the appellant, and to exempt other private carriers similarly situated from such regulation is to deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Assuming *arguendo* that the state of Florida has the power to require a certificate of public convenience and necessity of the appellant as a condition precedent to his use of its highways, we submit, nevertheless, that, in the instant case, the appellant cannot be subjected to the exercise of that power by a statute which, on its face, and as construed, is patently arbitrary, discriminatory and unreasonable.

Under the statute, not all private carriers are subjected to regulation; indeed, not all common carriers are subjected to regulation. In the initial definition of auto trans-

portation companies, all carriers, both common and private, who do not operate between fixed termini or over regular route are outside the scope of the statute. That part of the statute, here challenged, reads (Sec. 1(h)):

> "The term 'Auto Transportation Company,' as used in this Statute shall not include corporations or persons * * * engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fish and salt fish and oysters and shrimp from the point of production to the assembling point en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products."

Exempt from the operation of the statute, among others, are those carriers engaged in the business of transporting the commodities of the principal industries of Florida; in short, the exceptions swallow up the rule.

It should here be pointed out that we are not challenging the constitutionality of this statute upon the ground that shipper-owned vehicles in every line of business are excluded from its regulation. Nor solely upon the ground that the statute discriminates without justification between carriers, public and private, who operate between fixed termini or on a regular route, and carriers, public and private, who do not. Our attack is based upon a discrimination even more fundamental and less justifiable—a discrimination between private carriers operating between fixed termini or over a regular route, and engaged in the same business of transporting for hire, and differing only in the kind of commodities making up their loads.

A state, in the exercise of its police power, can undoubtedly classify the subjects of regulation; but such classification must be based upon some reasonable ground—some difference which bears a just and proper relation to the at-

tempted classification—and is not a mere arbitrary selection. *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540; *Truax* v. *Corrigan*, 257 U. S. 312, 332; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 111.

No justifiable basis for classification here exists. None is set forth in the Court's opinion. There a conclusion is merely stated and nothing more. No reasons are suggested to support this conclusion nor can any be spelled out.

It cannot be said that the basis of classification rests upon the fact that carriers of agricultural, horticultural, dairy and fish products do not operate between fixed termini or on a regular route, whereas the other carriers so do. That there are such carriers of agricultural, horticultural, dairy and fish products who do operate between fixed termini and on a regular route is implicit in the terms of the statute. Otherwise, there would have been no necessity for the legislature to carve out the present exemptions, inasmuch as the initial definition of an auto-transportation company is specific enough to exclude, without need of specific exemption, all carriers, both private and common, who do not operate between fixed termini or over a regular route.

Perhaps the Florida Legislature, in carving out these exceptions, intended to encourage and favor the principal industries of the state to the end that their products might be placed within the ready reach of all, and their production fostered and assisted. This suggestion, however, strikes at the root of every argument advanced by the advocates of certificate control, and is based on the premise that the interests of the shipping and consuming public lie in non-regulation.

As a regulation of the business of transportation, the only possible end certificate regulation might achieve is to secure adequacy and continuity of service to those who ship by motor carrier. The whole theory of such control is that the shipping interests will be best served by preventing ruinous competition between motor carriers, which in the end would result in a break down of motor transportation facilities. If these premises be accepted, and they must if certificate control as a regulation of business is to be sustained, it is difficult to perceive why the carriers hauling farm, dairy and fish products are not here favored at the expense of the producers of those commodities, and why non-regulation of such carriers is not a detriment, rather than a benefit, to the interests purported to be encouraged; and if these premises be sound, it is difficult to perceive why carriers, private and public, who do not operate between fixed termini or on a regular route, are not subjected to regulation. With them outside the statute, no possible hope exists of eliminating ruinous competition.

But even if the major industries of Florida were to be favored by these exemptions, this, in and of itself, would not save such exemptions from being arbitrary and unreasonable. Exceptions designed for the benefit of agricultural, dairying, or fishing interests, have been held to be discriminatory when not resting upon some reasonable basis of distinction. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563-564.

The classification attempted by the Florida statute cannot be grounded on the difference between the service demanded of carriers within the statute and the service demanded of those without. Adequacy and continuity of service are no more essential to the shippers of ordinary freight than to the farmers, dairymen and fishing interests.

A breakdown of motor transportation facilities would undoubtedly affect the producers of raw materials as seriously as anyone else. It is common knowledge that the products of the farms, the orchards, the dairies and the fisheries are perishable commodities, calling for, as much, if not more, expedition than the general run of staple goods hauled. Certainly no less. On the very hypothesis that certificate regulation will prevent any shortage or inadequacy of motor carrier service, and is a beneficial regulatory measure, there exists no reasonable basis for including one group of carriers within the operation of the statute and leaving another group arbitrarily without. Neither the type of commodities nor the needs of the persons served by these exempt carriers furnish a reasonable ground on which to rest this classification. As a regulation of the business of contract motor transportation, the statute, therefore, is highly discriminatory, subjecting as it does, one group of carriers to drastic regulation even to the extent of prohibition, and permitting another group to escape such regulation solely on the ground that they transport farm, fish and dairy products exclusively.

Similar exemptions were held invalid in *Franchise Motor Freight Association* v. *Seavey*, 196 Cal. 77, 235 Pac. 1000. There the Supreme Court of California decided that the exemption of carriers, engaged exclusively in the business of transporting farm products, implements of industry or other farm necessities to and from the farm and initial shipping

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* *Stats. of California*, 1923, p. 644:

"Each application for a certificate of public convenience and necessity, * * * must be accompanied by a fee of fifty dollars; provided, however, the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouses or other initial point shall not be subject to the regulations of this act."

points, from certificate control constituted a denial of the equal protection of the law, saying on page 1004:

> "We do not mean to infer that every classification, based upon a distinction between farmers on the one hand and all other persons on the other, is unconstitutional, but we are impelled to conclude that no natural, intrinsic, or constitutional distinction is to be found as a basis for the exemption of the transportation companies described in the 1923 amendment, supra, from the regulations prescribed in the Auto Stage and Truck Transportation Act, and that such attempted exemption is violative of the Fourteenth Amendment to the federal Constitution, and of like provisions in our state Constitution."

Even viewed as a highway measure, which most certainly the statute is not, the act, nevertheless, remains discriminatory.

If the object of certificate control is assumed *arguendo* to be the conservation of the public highways, any classification of carriers must rest upon some difference with respect to the wear and tear upon the public roads.

The instant classification is entirely without this foundation. At the risk of seeking to demonstrate the obvious some illustrations may be given:

> (1) Private carrier, X, is under contract with the Florida Orange Company to haul its oranges from its orchards to the primary market, Jacksonville. X is not subject to regulation.
>
> Private carrier, A, operating a truck of the same size, equipped with the same tires is under contract with the A. & P. Company to transport the same oranges to its retail stores, which are located along the same highway which X uses. A is subject to regulation, though the extent of this use and the weight and even the subject matter of his load are in no way different from X's.
>
> (2) Private carrier, Y, is under contract to haul each day fish, heavily iced, from the place of production to Jacksonville. His truck and load weigh six thousand pounds. Y is not subject to regulation.

Private carrier, B, is under contract daily to carry pasteboard cartons from Jacksonville over the same highway to a factory located at the place where Y begins his hauling. The aggregate weight of truck and load is three thousand pounds. B's truck is the same size, model and make as Y's. B is subject to regulation; though, as a matter of fact, his usage will occasion less wear on the roadbed than will Y's, since his load is lighter.

(3) Private carrier, Z, is under contract to haul exclusively dairy products in his *four-ton* truck daily between fixed termini. Z is not subject to regulation.

Private carrier, C, ninety-five per cent of whose business is transporting on a regular route similar dairy products in a *one-ton* truck is subject to regulation for the reason that five per cent of his business consists in bringing back groceries from the primary market to the dairies which have him under contract.

Illustrations might be multiplied. These are sufficient to show that the classification bears no conceivable relation to the conservation of the public roads of Florida. The ordinary criteria of the size and weight of the vehicles are not considered; the extent of the use is not the test; and even the content of the load in the last analysis is unimportant.

Finally if the object of certificate control be in the interest of less congestion and more safety upon the public highways, the above illustrations equally serve to point out that those trucks under certificate control are no more of a menace, and, in fact, less in many instances, than the trucks exempted, if size, weight and frequency of use be any criteria. A truck under hire takes up no more room than one driven by its owner; and trip for trip a vehicle running between fixed termini wears the roadway no more than its rambling fellow traveler. Certainly as between trucks operating between fixed termini or on a regular route there can be no difference in wear and tear on the roadbeds; and certainly

between trucks *inter se* operating between fixed termini or on a regular route there can be no difference in any potential danger to the public. So far as congestion goes, the number of vehicles of the exempt class operating over the highways of Florida greatly outnumbers those within the operation of the statute. This Court will take judicial notice that in Florida the principal commodities transported are the products of agriculture, horticulture, dairy and the fishing industries.

All of which goes to prove the speciousness of any attempt to justify the exemptions either in the interests of conserving the public roads, or of making them safer and less congested.

In *Frost* v. *Corporation Commission*, 278 U. S. 515, 524, a statute requiring a certificate of public convenience and necessity from an individual who operated a cotton gin, but exempting corporations from such a requirement, was held to be discriminatory and a denial of the equal protection of the laws. Mr. Justice Sutherland has characterized the requirement of a certificate of public convenience and necessity as "an onerous restriction upon the right to engage in a public business" with "a greater burden laid upon" those within the statute than upon those without. With respect to the statute there under review, he said, on page 524:

> "That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based on no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

We submit that the instant statute whether viewed as a regulation of the business of private carriage, which it

admittedly is, or as a highway measure, arbitrarily discriminates between private carriers *inter se* without reasonable grounds to justify such classification.

POINT V.

By imposing an unreasonable and arbitrary tax upon the appellant and exempting others similarly circumstanced from the burdens of such taxation, the State of Florida has denied the appellant his right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

All the arguments advanced under Point III, urging that there is no reasonable basis for distinguishing between the two classes of contract carriers for purposes of regulation apply with equal force to the imposition of the so-called "mileage tax".

The Supreme Court of Florida has characterized the present "mileage tax" as a levy "laid on the business" of intrastate commerce, "calculated according to the road miles that are covered" (R. 46). Assuming for the sake of argument only, that the nature of the instant levy is a tax, and not a toll, as we shall later contend, we submit that the tax in its incidence arbitrarily discriminates against the appellant and denies him the equal protection of the laws.

While it is true that a state is sometimes granted more latitude in classification for the purpose of taxation than for mere regulatory purposes, the equal protection clause of the Fourteenth Amendment operates as a check upon this freedom. There is a point beyond which a state cannot go

without denying the equal protection of the laws. A state, therefore, is not at liberty to resort to classification that is palpably arbitrary. The rule is generally stated to be that the classification "must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240; *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 75; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412.

The object of this tax is set forth in Sections 15 and 18 of the Act. It is to provide funds to pay for the past and future construction of a state system of roads and its maintenance. The underlying purpose of the tax is to obtain reimbursement from those who use the public roads in the business of transporting for hire. The statutory disposition of the moneys is conclusive on this score.

If any such burden is to be laid upon carriers for hire, we submit that it should fall upon all those similarly circumstanced—upon all those who use the public roads in their business of transportation alike and without favor. If such a "tax" is exacted on the theory, as this tax admittedly is, that those businesses which profit by use of a public improvement should contribute to its initial cost and defray the expenses of its maintenance, it is difficult to perceive how any classification of carriers for such taxation into those operating and those not operating between fixed termini or over a regular route on the highways of Florida, could be anything but arbitrary. Certainly, the classification here challenged is arbitrary, unreasonable and capriciously discriminatory,

where even between carriers operating between fixed termini or on a regular route, the statute makes an artificial distinction with respect to the mileage tax.

Using the cost to the State as the yard-stick, there is no difference on which to rest this classification. Usage of the public roads by carriers within the statute is no more an expense to the State than usage by those exempt. As shown by the illustrations in Point III (*supra*, pp. 37-38), the classification bears no relation to the wear and tear on the highways occasioned by the vehicles of either group. Weight, size, content of load, and extent of use are not the determining bases.

The capricious incidence of this "tax" is further shown by recognition of the fact that the businesses of the greater number of carriers for hire who operate between fixed termini are relieved of this burden, while upon the remainder only is saddled the onerous charge. Moreover the pleasure car, the owner-driven truck and the seeker for random employment travel the roads tax free.

The burden is very real, as we point out in Point VI (*infra*, pp. 54-57). As the "tax" now stands, it will preclude a private carrier who does not transport farm, dairy and fish products exclusively, from ever making competitive bids against an exempt carrier, to obtain a contract to haul such products.

Perhaps the producers of those commodities, which under the statute are carried by tax exempt carriers, may be indirectly aided by these exemptions, in that the cost of shipping their products by motor truck is not to be increased by the tax. Nevertheless, a desire to favor agricultural and kindred interests does not of itself permit a state legislature for tax purposes to make classifications otherwise arbitrary. In *Lossing* v. *Hughes* (Tex. Cr.), 244 S. W. 556, 560, a statute

was held unconstitutional which imposed a license tax upon all "owners * * * of motor trucks and tractors, except those who operate them for agricultural purposes." In its opinion, the court characterized the statute and its "discriminations" as "class legislation", saying that it could "conceive of no enactment which more clearly falls within that category." In no uncertain terms, the court went on to say:

> "Without indicating any reason for it, the Legislature by the provisions of this law imposes penalties and restrictions upon the property rights which inhere in the ownership and operation of commercial motor vehicles, and exempts motor vehicles used in agricultural pursuits from such penalties and restrictions; and, equally without indicating any reason for it, makes criminal the use of certain motor vehicles for commercial purposes and, at the same time, makes lawful the use of the same vehicles for agricultural purposes upon the same roads. No reason suggests itself to us as a justification of such discriminations. In these respects, as well as in other respects apparent at a glance, the owner and users of commercial motor vehicles are made the victims of capricious discrimination."

Here, likewise, the appellant and other private carriers within the statute are "victims of capricious discrimination."

See also, *Quaker City Cab Co.* v. *Pennsylvania* (*supra*); *Connolly* v. *Union Sewer Pipe Co.* (*supra*); *Franchise Motor Freight Ass'n* v. *Seavey* (*supra*); *Kellaher* v. *City of Portland*, 57 Ore. 575, 112 Pac. 1076; *Valentine* v. *Berrien*, 124 Mich. 664, 83 N. W. 594; *Bacon Service Company* v. *Huss*, 199 Cal. 21, 248 Pac. 235; *Weimar Storage Co.* v. *Dill* (1928, N. J.), 143 Atl. 439.

The recent decision in *Bekins Van Lines, Inc.*, v. *Riley*, 280 U. S. 80, 82, is clearly distinguishable from the instant case. This Court recognized "that a marked distinction exists between common and private carriers by auto vehi-

cles" for purposes of a tax laid on the gross receipts of a common carrier's business; and that such difference constituted a reasonable basis of classification. The distinction was bottomed on the ground that operation by common carriers "between fixed termini" in the "use of the highways", was "regular and frequent and therefore unusually destructive thereto", and that such operation would more likely "expose the public to dangers exceeding those consequent upon the occasional movements of other carriers". In the instant case, the cleavage is not between common and private carriers; nor, indeed, solely between carriers operating between fixed termini or over a regular route and carriers who do not. Here carriers, who do operate between regular termini and on a regular route, are exempt from the operation of the statute merely because they transport exclusively certain designated commodities. The differences, therefore, by which the classification was justified in the *Bekins* case are not here present. As shown above, the attendant consequences of the instant classification do not tend to preserve a highway from destruction or to protect the public from the dangers occasioned by movement of carriers.

We submit, therefore, that whether the levy under this statute be regarded as a tax or as a toll, it is patently discriminatory and constitutes a denial of the equal protection of the laws.

POINT VI.

The so-called Mileage Tax imposed by Chapter 13,700, Laws of Florida, 1929, is not a tax but a toll exacted by the State for the use of all its public highways and is, therefore, invalid, conflicting, as it does, with the Federal Highway Act, Chapter I, Section 9, in contravention of Article VI, Section 2, of the Constitution of the United States.

It was urged below that the so-called mileage tax was in fact not a tax but a toll exacted by the State for the use of all public highways in the State, and was in conflict with Section 9, Chapter 1, of the Federal Highway Act, which provides:

> "All highways constructed or reconstructed under the provisions of this Chapter shall be free from tolls of any kind."

In the petition for writ of *habeas corpus* which was duly sworn to, it was alleged that "many of the roads over which petitioner hauls are Federal Aid Roads" (R. 4).

This material allegation or averment was not denied.

It is elementary that any allegation or assertion not denied is admitted to be true.* The Supreme Court of Florida accepted as a fact the above statement, but took exception only to the fact that it did not appear that all of the roads over

* See *Whitten* v. *Tomlinson*, 160 U. S. 231, 240.

which petitioner operated were Federal highways, saying (R. 47):

> "It is not shown that the petitioner operates only upon highways that have been constructed or reconstructed under the Federal Highway Act."

The roads over which petitioner operated are fully set forth in the Record (R. 8). All of these roads are Federal aid highways, except the streets of the City of Jacksonville. Of this fact the Court below must have taken judicial notice.

If, however, the so-called "tax" is not a tax but is a toll, it is immaterial that some of the roads or a few miles of some one road were not constructed with Federal funds in view of the fact that many of the roads over which the petitioner operated were constructed or reconstructed under the Federal Highway Act.

The Supreme Court of Florida has held that the State of Florida can collect a levy measured by the "road miles that are covered" over all highways within the state, including Federal Aid Highways. This, the Court said, the State could do, "even if the 'mileage tax' as here imposed * * * be regarded as a toll under the Federal Highway Act" (R. 46-47). With all deference to the learned State Court, we submit the Court was led into error. If the State is collecting tribute in contravention of the Federal laws and Constitution, it matters not how much or how little the unauthorized exaction may be. The complete answer to the State Court's holding is found in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, 431, where it was held that any exercise of an unauthorized power to collect tribute, however slight, should be condemned, the theory being set out in Chief Justice Marshall's famous

aphorism "That the power to tax involves the power to destroy".

If the "mileage tax" is not a tax but a toll, the Florida statute clearly conflicts with the Federal Aid Highway Act. The question here presented is whether or not the levy is a toll within the meaning of the Federal Highway Act. It is significant that Congress was not content in its prohibition to use the term "toll" alone. It went further and specifically prohibited "tolls of any kind". In determining whether or not a levy is a toll or a tax, the term "toll" should, therefore, be broadly construed and any doubts with respect to its nature resolved in favor of a "toll".

The fact that the State Court characterized this levy as "a license tax imposed upon the interstate business of transportation for compensation on the public roads of the State" is not of itself conclusive. This Court has said with great clarity in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625:

> "As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg, &c., Ry. Co.* v. *Texas*, 210 U. S. 217, 227."

The fact that the levy is called a tax is not in itself sufficient to change the intrinsic nature of the imposition. *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 36, 37; *Lipke* v. *Lederer*, 259 U. S. 557, 561-562; *Hill* v. *Wallace*, 259 U. S. 44, 66-67; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, 348. When determining the nature of a levy, matters of substance must be regarded and not mere form. *Weiss* v. *Stearn*, 265 U. S. 242, 254. If, in substance, the exaction is a toll, it must be so regarded.

A toll* is a demand of proprietorship, while a tax is a demand of sovereignty. *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92, 97; *Cooley on Taxation*, Vol. I, Section 14, 4th Edition. The amount of toll is determined by the cost of the property or of the improvements and the extent of use; while taxes are levied for the support of the Government and the amount is regulated by the necessities of the Government. *Sands* v. *Manistee River Improvement Company*, 123 U. S. 288, 293; *Huse* v. *Glover*, 119 U. S. 543, 548.

In the opinion below it was asserted that the imposition was not a toll because it was not "collected for mere passage over the roads or exacted when and as the privilege of passage is exercised". In other words, the manner and time of collection was considered controlling.

The correct rule has recently been pronounced by this Court, and, as we understand it, is this: When the charge is based upon the extent of use, and the liability is incurred when, and as, the use is enjoyed, even though payment to satisfy such liability is not then made, the imposition is a toll

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* Citation of authority hardly seems necessary to expound the common law conception of a "toll". See, however:

New York, Lake Erie & Western Railroad Company v. *Pennsylvania*, 158 U. S. 431, 435-536;

Lake Superior and Mississippi Railroad Company v. *United States*, 93 U. S. 442, 457-459;

Reading Railroad Company v. *Pennsylvania*, 15 Wall. 232, 277-278;

Geiger v. *President, Etc., of Perkiomen & R. Turnpike Road*, 167 Pa. 582; 31 Atl. Rep. 918, 919;

The Pennsylvania Railroad Co. v. *Sly*, 65 Penn St. 205;

Boyle v. *The Philadelphia and Reading Railroad Company*, 54 Penn. St. 310, 313-314;

McNeal Pipe & Foundry Co. v. *Howland*, 111 N. C. 615; 16 S. E. 857, 860.

and not a tax. *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73-74.

In the present case there is no levy unless a public road is used, and even then the imposition is based entirely upon the extent of the use. The levy bears no relation to the business of the carrier. Its amount is not determined by the volume of business. Nor is it measured by gross income, net receipts or any factor connected with the business as such. The sole determinative factor is the extent of the use of the public highway. If the road is used one mile, the imposition is one cent, and if the road is used one hundred miles the imposition is one dollar, whether or not the vehicle is loaded to capacity or empty. The imposition is solely "calculated according to road miles that are covered".

There are two prevailing rates with respect to trucks: "One cent per mile on all trucks with a loaded capacity of less than 5,500 lbs. * * * two cents per mile on all trucks with a loaded capacity of 5,500 lbs." (Sec. 15). A trailer is rated on the same basis as a truck. The passage of a truck and trailer is counted as two vehicles and the charge is calculated accordingly. The weight and size of the vehicle fixes the rate scale; the number of vehicles determines the units; and the imposition is calculated by the number of "road miles covered". Every essential characteristic of a toll is here present.

In the instant case, it is true that the levy is not collected at the time of passage. However, as a condition precedent to the use of the highways, it is required that an advance payment be made of $75.00 every three months (Sec. 15). Adjustments are made from time to time in order to balance the books. At the time of these periodical settlements the

extent of the use is the controlling factor in determining the amount of the charge. Because there is no toll gate at every mile post on the public highway; and because the one cent is not actually collected as, and when, each mile of the highway is traveled, the levy cannot be denied the essential characteristics of a toll. The charge may be collected at the end of each mile or one hundred miles, or at the end of each day or each ninety days, but so long as the charge is based upon the extent of the use, it is a toll and not a tax.

A toll is no less such because cash payment is not demanded nor made. Credit was often extended to those who used turnpikes or canals, and an action at common law would lie for compensation for such use. *Jordan & Skaneateles, Pl. R. Co.* v. *Morley,* 23 N. Y. 552. This question was discussed in *Pennsylvania Coal Company* v. *Delaware & Hudson Canal Company,* 40 N. Y. (1 Keyes) 72, 80-81, where the Court of Appeals said:

> "It is very true that tolls ordinarily are payable on demand or when the benefit for which they are demandable is received. At common law a distress was incident to toll or where the toll was for the passage or the like, the passage could be refused until the toll was paid. * * * The argument for the defendants to show that in all the cases specified by the contract now before us, the compensation for the passage of the plaintiffs' boats must be made contemporaneously, rests almost entirely upon the force of the word 'toll' in the contract as necessarily importing an immediate payment. It is one answer to this argument that the compensation for which this contract stipulates would be legitimately and properly called toll although not paid or exacted at once. A case might readily be supposed in which the whole compensation for a year's use of the canal might be payable in gross, as toll for a year, and not tolls for the several passages."

In *Kane* v. *New Jersey*, 242 U. S. 160, 168, Mr. Justice Brandeis took occasion to indicate that a levy "based on mileage" is a "toll".

It will doubtless be urged that the present levy is no toll because the charge is not made against every one using the public roads. Such argument but further illustrates the unreasonable and discriminatory nature of the imposition. Such an attack is directed at the arbitrary incidence of the levy, not at its inherent characteristics. No one will deny that a charge of one dollar for passage over a bridge is a toll, even though certain persons or vehicles may have free passage. It has long been a custom, on toll roads and toll bridges, to exempt from tolls, funeral processions, those engaged in charity work and ministers of the gospel.

The levy in question is materially different from gasoline taxes. The gasoline tax does not measure the extent of the use of the highway. One motor vehicle may use one gallon to ten miles and another one gallon to twenty miles. Gasoline is used in motorboats, aeroplanes and stationary engines. Such a levy is based upon the extent of the use of gasoline and not upon the extent of the use of the highway.

The instant case presents an entirely different issue from that in *Carley & Hamilton* v. *Snook* (*supra*), which involved flat registration fees, not impositions calculated on the road miles covered. In pointing out why such registration fees were not "tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge", this Court stated (pp. 73-74) the distinguishing characteristic of a toll to be a charge "exacted when and as the privilege of passage is exercised", based on "the extent or frequency of the use of the highways".

The imposition in the present case is not open to the objection there raised by this Court concerning the improbability of any Congressional intent to procure "without more explicit language" the abandonment of the registration fees, a "well recognized type of taxation." The present levy is a newly devised revenue plan, not a "well recognized type of taxation" existing at the time of and prior to the Federal Highway Act of 1921 (p. 74), and is just such a levy as Congress must have contemplated the states would attempt under the guise of taxation, and for that reason expressly prohibited the imposition of *"tolls of any kind"*.

The so-called "mileage tax" here under review approximates an old-fashioned toll as clearly as any imposition could in this twentieth century. It can hardly be argued that Congress in 1921 had in mind only those levies which might be collected in the manner, under the same conditions, with the same appurtenances present as existed on a nineteenth century turnpike. In the march of events, meters have taken the place of toll-gates, and accountants the roles of gate-keepers. The charges exacted for passage over the roads remain, nevertheless, tolls in every sense of the word "toll" in the Federal Highway Act. Inasmuch as the present imposition is based on the number and size of the vehicles passing, and is measured by the extent of their use of the highways, and inasmuch as 95% of the levies collected goes to pay for the past, present and future maintenance and construction of the improvements used, no distinction, we submit, can be drawn between the present levies and "tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or a bridge". The fact that the proprietor in the instant case happens to be the State of Florida is immaterial. *Huse* v. *Glover*, 119 U. S. 543, 548.

Many a toll has been collected as such by sovereign states and political subdivisions thereof.* Franchises were granted in the old days to private corporations to construct turnpikes and to collect tolls thereon, on the theory that the state or county was delegating to the corporations or individuals the power which the sovereigns themselves could exercise.†

We submit that the so-called tax is not a tax but a toll; that many of the roads over which appellant travels were constructed under the Federal Highway Act, that the Federal Highway Act was enacted pursuant to the Constitution of the United States and that the imposition or levy in question is prohibited by the Federal Highway Act and thereby violates Section 2 of Article VI of the Constitution of the United States.

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* For other cases recognizing the power of a State or subdivision thereof to exact "tolls", see:

Carson v. *Brockton Sewerage Commission*, 182 U. S. 398, 404;
St. Louis v. *Western Union Telegraph Company*, 148 U. S. 92, 94-97;
Hamilton v. *Commonwealth*, 143 Va. 572; 130 S. E. 383, 385;
State v. *Schenkel*, 129 Mo. App. 224; 108 S. W. 635, 636-639-640;
St. Joseph Plank Road Co. v. *Kline*, 106 La. 325; 30 So. Rept. 854, 857.

† *Turnpike Co.* v. *Illinois*, 96 U. S. 63, 68;
Covington &c. Turnpike Co. v. *Sandford*, 164 U. S. 578, 587;
James H. McKee et al. v. *The Grand Rapids and Reed's Lake St. Rwy. et al.*, 41 Mich. 274; 1 N. W. 873, 876;
Gilson et al v. *Board of Com'rs of Rush County*, 128 Ind. 65; 27 N. E. 235.

POINT VII.

Whether the "Mileage Tax" be construed as "a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State" or a "toll" charged for passage over the highways, such "tax" is so arbitrary and oppressive as to amount to confiscation of appellant's property in violation of the guarantee of the Fourteenth Amendment.

The uncontradicted testimony of reputable private carriers, including that of appellant, shows that under the burden of this tax, contract carriers will not be able to perform their existing contracts and, as a consequence, will be forced to go out of business* (R. 13, 15, 17, 23, 24).

Shippers, who now find it economically to their advantage to make private contracts for the transportation of their

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* Hereunder is set forth an income statement of the appellant. His situation is no different from that of others engaged in the same business. In other words, the levy will not inflict a peculiar burden upon the appellant alone. His financial condition is no weaker than that of other carriers likewise engaged. His is merely a typical case. (See testimony of L. R. Cooper (R. 14-15); B. C. Naugle (R. 16-18); G. T. Curren (R. 22-25).)

INCOME STATEMENT

Gross Income Per Week		*Expenses.*	
To Fernandina,	$30.00	20 tires per annum, at $82.00 each	$1,640.00
Vero Beach and Ft. Pierce	60.00	7500 gal. of gasoline at 16¢ per gal.	1,200.00
Melbourne	55.00	Insurance	200.00
Titusville	50.00	Helper	1,100.00
Total per week	$195.00	Upkeep and repairs	750.00
Total for the year	$10,140.00	Oil	100.00
			$4,990.00

goods, will hardly permit the "tax" to be tacked on to the present cost of transportation, when, as a practical matter, they can purchase their own trucks, employ their own drivers, and haul their own freight, and, by so doing, relieve the cost of transportation of the additional burden in the form of this "tax".

The private business of transporting goods for compensation over the public highways is a useful and legitimate occupation, and as such is neither noxious nor detrimental to the public welfare. To legislate it out of existence without achieving any of the ostensible aims of the statute is, to say the least, palpably arbitrary. Shipper-owned trucks or trucks of other carriers will replace those of the contract carriers. Congestion on the highways will not be relieved. Wear and tear on the highways will not be lessened. And

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His taxes are as follows:

		Total Charges Per Year	
Ad valorem	$120.00		
Gasoline	450.00		
License, for truck and trailer	339.00	Expenses for operation	$4,990.00
Mileage tax under new law	*1,200.00*	Taxes	2,109.00
		Depreciation or replacement	2,000.00
Total taxes	$2,109.00	Total charges	$9,099.00

In explanation of the figures representing gross income, it should be noted that the appellant's earnings for the year are calculated on the basis that the truck and trailer go loaded to capacity on each trip, which is not, in fact, the case, as the record shows (R. 25).

With reference to the items of expense, it should be explained that the life of a set of tires is only six months, and that it requires ten tires for a full set (R. 9-10). The mileage tax under the new law is calculated on the basis of its present run (R. 18). A depreciation allowance of $2,000 is a reasonable one. The cost of his truck and trailer is $6,000 (R. 11). With normal use, they will last approximately three years (R. 11, 16).

Appellant's net earnings per year so calculated would be $1,041. This includes $360, which he might reasonably expect as a return on his capital invested elsewhere at six per cent, leaving $681 as compensation for his time and labor. And this only in the event that his truck and trailer carry capacity loads at all times, which can hardly be expected (R. 8-13).

adequacy and continuity of service can hardly be assured, when the very instrumentalities of service no longer operate. If any or all the above be the ostensible objectives of this statute, the statute falls short of providing means reasonably adapted to its ends.

The levy of this tax, if it be such, would simply result in driving this appellant, as well as all other contract carriers, out of business and force these individuals, who are now independent operators, prosecuting their own businesses, either to enter the employ of some shipper owner as a driver of an employer's trucks or to pursue some other vocation.

Whether a statute be an exercise of the police power or a taxing measure, if its effect is to deprive individuals of their business, without serving some paramount social end, it should not be sustained. This was recognized in *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111:

> "That appellant's business is a property right, *Duplex Co.* v. *Deering*, 254 U. S. 443, 465; *Truax* v. *Corrigan*, 257 U. S. 312, 327, and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear * * * and, unless justified, as a valid exercise of the police power, the Act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law."

It is not as if this appellant and other private carriers do not already contribute their full share to the maintenance and upkeep of the public roads. They pay a 6¢ gasoline tax. They pay large license fees on their vehicles used for commercial purposes. They pay an *ad valorem* tax on their equipment. In short, before the passage of this statute, the business of private carriage was already heavily burdened.*

* See, Walker, Highway Tax Costs, (National Automobile Chamber of Commerce).

An additional levy which is so palpably unreasonable and confiscatory as to prevent a great number, if not all persons, from pursuing an otherwise lawful occupation should be stricken down as unconstitutional, amounting, as it does, to confiscation of property without due process of law. *Fiscal Court* v. *F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 298; *Chaddock* v. *Day*, 75 Mich., 527, 42 N. W. 977; *State* v. *Allen*, 83 Fla., 214, 91 So. 104.

POINT VIII.

Chapter 13,700, Laws of Florida, 1929, impairs the obligation of appellant's contract in violation of Paragraph 1, Section 10, of Article I of the Constitution of the United States, and deprives him of his liberty to contract in contravention of the Fourteenth Amendment to the Constitution of the United States.

By the uncontradicted evidence in the Record, the imposition of the "mileage tax" will force the appellant out of business and render the performance of his contract with the Great Atlantic & Pacific Tea Company impossible (R. 13, 15, 17, 23, 24). Not only this, the statute vests in the Railroad Commission the power to deny the appellant the right to perform under his contract.

On each and both these grounds, we submit that the State of Florida has unconstitutionally impaired the obligations of appellant's contract. *Detroit United Railway* v. *Michigan*, 242 U. S. 238; *Louisiana R. & Nav. Co.* v. *Behrman*, 235 U. S. 164, 170.

As a further consideration, appellant's future liberty of contract is circumscribed. He may not, by the terms of the statute, contract in the conduct of his private business, with whom he chooses and on such terms as he may bargain. Instead, his scope of business is determined by the limits of his certificate, and application must be made afresh to the Railroad Commission to sanction any new undertaking. This, we submit, is a deprivation of his liberty without due process of law, of his "right to follow any of the common occupations of life" in violation of the Fourteenth Amendment to the Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *Butchers' Union Slaughter Co.* v. *Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 752, 754.

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Florida should be reversed, and the case remanded with directions that the appellant be discharged.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Florida Statute Now Before This Court for Review.

CHAPTER 13,700, LAWS OF FLORIDA, 1929.

[See Compiled Gen. Laws of Florida, Section 1335.]

AN ACT PROVIDING FOR THE SUPERVISION AND REGULATION OF PERSON, FIRMS, CORPORATIONS AND ASSOCIATIONS OWNING, CONTROLLING, OPERATING OR MANAGING MOTOR VEHICLES USED IN THE BUSINESS OF TRANSPORTING PERSONS OR PROPERTY FOR COMPENSATION OVER THE PUBLIC HIGHWAYS OF THE STATE: DEFINING AUTO TRANSPORTATION COMPANIES AND PROVIDING SUPERVISION AND REGULATION THEREOF BY THE RAILROAD COMMISSION OF THE STATE OF FLORIDA, AND PROVIDING FOR THE ENFORCEMENT OF THE PROVISIONS OF THIS ACT AND FOR THE PUNISHMENT OF VIOLATIONS THEREOF IMPOSING A MILEAGE TAX AND PROVIDING FOR THE DISPOSITION OF THE REVENUE RAISED BY THE SAME; AND REPEALING ALL ACTS INCONSISTENT WITH THE PROVISIONS OF THIS ACT.

Auto Stage and Truck Transportation Act of California which was held unconstitutional in Frost v. R. R. Commission of Cal., 271 U. S. 583.

An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by automobiles, jitney busses, auto trucks, stages and auto stages; defining transportation companies and providing for the supervision and regulation thereof by the railroad commission; providing for the enforcement of the provisions of this act and for the punishment of violations thereof; and repealing all acts inconsistent with the provisions of this act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [illegible]LORIDA:

(1) Definitions:

(a) The word "Commission" means the Railroad Commission of this State.

(b) The term "corporation" when used in this Article means a corporation, a company, association, or joint stock association.

(c) The term "person" means an individual, firm or co-partnership.

(d) The word "certificate" means the Certificate of Public Convenience and Necessity authorized to be issued under the provisions of this Article.

(e) The term "public highway" means every public street, road or highway in this State.

(h) The term "auto transportation company" when used in this Article means every corporation or person, their lessees, trustees, or receivers, owning, controlling, operating or managing any

CHAPTER 213, STATUTES 1917, PAGE 330.
(Approved May 10, 1917)

Amended by Ch. 280, Stats. 1919, p. 457; Ch. 840, Stats. 1921, p. 1609; Ch. 310, Stats. 1923, p. 644; Stats. 1925, Ch. 145, p. 297; Ch. 153, p. 302; Ch. 254, p. 433.

The People of the State of California do enact as follows:

Section 1. (a) The term "corporation," when used in this act, means a corporation, a company, an association or a joint stock association.

(b) The term "person," when used in this act, means an individual, a firm or co-partnership.

(d) The term "public highway," when used in this act, means every public street or highway in this state.

(c) The term "transportation company," when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling,

motor-propelled vehicle not usually operated on or over rails used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route: provided, that the term "auto transportation company" as used in this Article, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel buses from a depot to a hotel in the same town or city. Those passenger buses that operate over a definite route on regular schedules and which are regulated by the legislative body of a city, furnishing public transportation wholly within the corporate limits of any city or between cities whose boundaries adjoin, are hereby expressly excluded from the provisions of this Article.

operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term "transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term "transportation company" as herein defined.

(g) The words "between fixed termini or over a regular route" when used in this Article means the termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route, whether such departures be periodical or irregular, whether or not any motor propelled vehicle is operated by any auto transportation company "between fixed termini or over a regular route" within the meaning of this Article, shall be a question of fact to be determined by the Commission, and the finding of the Railroad Commission thereon shall be final except as to appeal and review as hereinafter provided.

(f) The term "motor vehicle" shall include all vehicles or machines propelled by any power other than muscular used upon the public highways for the transportation of persons or property for compensation as common carriers, except motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by a transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the

(e) The words "between fixed termini or over regular route," when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney bus, auto truck, stage or auto stage is operated by a transportation company "between fixed termini or over a regular route" within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review. [Amended, Ch. 280, Stats. 1919, p. 457; and Ch. 145, Stats. 1925, p. 297.]

Each application for a certificate of public convenience and necessity or for an order authorizing the sale, leasing, assignment or transfer of an existing operative right, privilege, franchise or permit made under the provisions of this section must be accompanied by a fee of fifty dollars; *provided, however,* the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouse or other in-

point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products, or by any transportation company engaged in operating taxicabs, or hotel buses to or from a depot to a hotel in the same town or city.

(i) For the purpose of this Article, all vehicles equipped to carry a load which are attached to and drawn by a motor vehicle are hereby defined as "trailers" and shall be classed as motor vehicles and subject to the provisions of this Article.

(j) The term "width of tread" means the width of the vehicle measuring from the center of tread of the outside tire to the center of tread of the opposite outside tire.

(2) Certificates to operate; suspension.

No auto transportation company shall operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation, but no certificate shall be required for operation exclusively within the itial point shall not be subject to the regulations of this act. [Amended by Ch. 310, Stats. of 1923, p. 644.] (Above *proviso* declared unconstitutional Apr. 27, 1925, *Franchise Motor Freight Ass'n* v. *Railroad Commission*, 69 C. D. 473; 235 Pac. 1000.)

Sec. 2. No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

Sec. 5. No transportaion company shall hereafter begin to operate any automobile, jitney bus, auto truck, stage or auto stage for the

limits of an incorporated city or town.

The Railroad Commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

(3) Application for certificate to operate; hearing; contents of certificate.

Application for such certificate of Public Convenience and Necessity shall be made by such corporation, person, firm or association, their lessees, trustees, or receivers to the Railroad Commission; such application shall be in writing verified by the appli-

transportation of persons or property, for compensation, on any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective, or for operations exclusively within the limits of an incorporated city, town, or city and county.

* * *

The railroad commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section. [Amended, Ch. 280, Stats. 1919, p. 457.]

cant and shall specify the following matters:

1. The name and address of applicant and the names and addresses of its officers, if any.

2. The public highway or highways over which, and the fixed termini or the regular route, if any, between which, or over which applicant intends to operate.

3. The kind of transportation whether passenger or freight, or both, in which applicant intends to engage, together with a brief description of each vehicle and motor power which applicant intends to use, including the seating capacity thereof, if for passenger traffic, or tonnage, if for freight traffic, and including the size and weight of such vehicles.

4. The proposed time schedule of operation.

5. The schedule or tariff showing all passenger fares or freight rates proposed to be charged between the several points or localities to be served.

6. Whether or not the said applicant is or has been operating on said routes or other routes in the State, and for what length of time and upon what time schedule of operation and upon what schedule or tariff for passenger fares or freight rates.

Upon filing of said application the Railroad Commission

shall fix a time for hearing of said application, which shall not be less than five days nor more than thirty days subsequent to the filing of said application, and no application shall be granted or a Certificate of Convenience and necessity issued without a hearing by the Railroad Commission. Notice of such hearing shall be given to the applicant and to all transportation companies serving any part of the route between the fixed termini and to the mayor or chief magistrate of each city and town in or through which the applicant desires to operate at least five full days prior to said hearing, which said notice shall recite the fact of the filing of such application, the time and the place of the hearing of the same. A copy of said notice shall be mailed at least five days prior to the time for such hearing to any transportation company holding a Certificate of Public Convenience and Necessity and operating over the route or any part of the route specified in said application. At the time specified in said notice, or at such time as may be fixed by the Commission a public hearing upon said application shall be held by the Commission. At or after such hearing the Commission may issue a Certificate of Public Con-

venience and Necessity, as prayed for or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience and necessity may require: Provided, that in granting application for certificate, the Commission may take into consideration the length of time the applicant has operated a scheduled motor vehicle service between the termini named in the application; the general standard of the service maintained during this period; the reliability of the applicant and his sense of responsibility toward the public as shown during the period of his operation; his court record as well as the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory, and any other matters tending to qualify or disqualify him as a common carrier: Provided, that a Certificate of Public Convenience and Necessity shall upon hearing be granted as a matter of right to such Auto Transportation Companies operating in good faith on the 19th day of April, 1929, over the route for which such certificate shall be sought,

Any right, privilege, franchise, or permit held, owned or obtained by any transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the railroad commission. The railroad commission shall have power, with or without hearing, to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

who shall comply in full with the provisions of this Article.

When application is made by an Auto Transportation Company for a certificate to operate in a territory or on a line already served by a certificate holder under this Article the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission.

Each Certificate of Convenience and Necessity issued under the provisions of this Article shall contain the following matters:

1. The name of the grantee.

2. The public highway or highways over which, and the fixed termini between which the grantee is permitted to operate.

3. The kind of transportation, whether passenger or freight, or both, in which the grantee is permitted to engage, together with a statement of the number of vehicles to be operated and the maximum seating or tonnage capacity of the vehicle or vehicles which the grantee is permitted to operate.

4. Such additional provisions and limitations as the Commission shall deem necessary or proper to be inserted in the certificate.

No certificate of Public Convenience and Necessity is-

sued under the provisions of this Article may be assigned or transferred without the consent of the Railroad Commission authorizing such transfer.

No certificate shall be issued for the operation on any highway in the State of any motor vehicles of greater width of tread than eighty-four (84) inches and greater loaded weight than eighteen thousand (18,000) pounds, for passenger or freight traffic. The Commission is hereby authorized to prescribe the maximum width of tonneau or body including load of motor vehicles used in either passenger or freight service, taking into consideration the width of road over which the same is to be operated. And the said Commission is further authorized to suspend temporarily, when the condition of the public highway requires it, the operation of motor vehicles, either for passenger or freight transportation, along and over any public highway of the State, and notice of such suspension shall be given to every holder of a certificate for operation over the said highway and to the public by publication in some newspaper or newspapers in general circulation in the territory of the route.

(4) Bonds required to be given.

The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the person or corporation operating said freight carrying vehicle; and it shall be the duty of the applicant to procure and file with the Commission the said bond for liability and property damage, including loss of baggage when same has been checked in accordance with the rules prescribed by the Commission, giving the said bond or bonds in a surety company authorized to do business in the State of Florida, or deposit, in lieu of said surety bonds, bonds of the United States Government or of any city or county in the State of Florida approved by the said Commis-

sion. The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bonds to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this Article. And no certificate shall be valid until such bond has been filed and approved and no such bond so accepted shall be cancelled by the Company issuing the same except upon ten days' notice to the Commission; and upon such notice being given by the company issuing said bond or bonds, the certificate of the person or corporation giving bond shall be revoked, unless a new bond shall be filed and accepted before the date for the cancellation of the said bond: Provided, however, that the applicant may, in the

discretion of the Commission, be allowed to file in lieu of bond an insurance policy which shall be approved by the Commission, with some casualty company or insurance company or casualty or insurance carrier authorized to do business in the State of Florida.

(5) Powers of Railroad Commission.

The Railroad Commission of the State of Florida is hereby vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company; to prescribe a uniform system and classification of accounts to be used, which among other things, shall set up adequate depreciation charges; to require the filing of annual and other reports and all other data by said auto transportation companies; and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The Commission shall have power and authority by

Sec. 4. The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation company in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts service and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all others matters affecting the relationship between such companies and the traveling and shipping public. The railroad commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all transportation companies. The railroad commission, in

order to prescribe rules and regulations applicable to any and all such auto transportation companies. The Commission, in the exercise of the jurisdiction conferred upon it by this Article, shall have power and authority to make orders and prescribe rules and regulations affecting such auto transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, or village, and in case of conflict between any such order, rule or regulation, any such ordinance or permit, the order, rule or regulation of the Commission shall in each instance prevail. No municipality shall have the right to require such auto transportation company to furnish any bond or insurance policy, or pay any license, fee or tax except as herein provided.

(6) Schedule of rates, fares, etc., to be filed with Railroad Commission.

Upon the taking effect of this Article, it shall be the duty of every such auto transportation company to forthwith file with its application for a certificate of public convenience and necessity a schedule of its rates and fares, and a time schedule of all motor vehicles operated,

the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the order, rule or regulation of the railroad commission shall in each instance prevail.

Sec. 6a. Every transportation company shall annually furnish to the commission at such time and in such form as the commission may require a report in which the transportation company shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any transportation

all of which shall be kept on file by the Commission, subject to public inspection. The Commission shall require each auto transportation company to keep open for public inspection at designated offices so much of said schedule of rates and fares and time schedules as it deems necessary for the public information.

Whenever such rates or fares or time schedules are found to be unreasonable, the Commission, upon its own motion, or upon complaint, shall upon hearing as herein provided, prescribe reasonable rates and time schedules to take the place of those found unreasonable, and such new rates shall be filed in place of the rates of schedules superseded. No rates or time schedules filed with the Commission shall be changed by any such auto transportation company without an order of the Commission sanctioning the same. It shall be unlawful for any transportation company to collect or receive a greater or less rate or charges for any service rendered by it than the transportation charge made in the schedules on file with the Commission, and no new rates shall take effect until the date named by the Commission.

company to file monthly reports of earnings and expenses, and to file periodical or special or both periodical and special reports concerning any matter about which the commission is authorized by this or any other act to enquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. [Added, Ch. 840, Stats. 1921, p. 1609.]

(7) Violation of laws, regulations, etc.

The Commission may upon complaint, or upon its own motion, that any auto transportation company is violating the provisions of this Article or any of the rules or regulations prescribed by the Commission, or is violating any of the laws of the State, or any requirement of its certificate of Public Convenience and Necessity, issue its order to the said auto transportation company notifying it to appear before the Commission at a fixed time and place, at which time and place the Commission shall investigate the complaint made, and if it shall be satisfied after such hearing that the said auto transportation company holding a certificate has wilfully violated or refused to observe the laws of this State touching motor vehicles or any of the terms of the certificate issued to the said auto transportation company, or any of the Commission's orders, rules or regulations, the said Commission may suspend, revoke, alter, or amend any certificate issued under the provisions of this Article to the said auto transportation company; but the holder of such certificate shall have the right to appeal to the Supreme Court of the State as is now provided by law for appeals

from orders relating to railway or street railway corporations.

(8) Rules and regulations made by Commission within powers.

Every rule, regulation, decision, order or requirement made by the said Commission under the provisions of this Article shall be deemed and held to be within its jurisdiction and powers, and to be reasonable and just and such as ought to have been made in the premises, and to have been properly made and arrived at in due form of procedure, and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or can be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumption shall be in favor of every action of the said Commission and all doubts as to its jurisdiction and powers shall be resolved in its favor. If, in any proceeding to enforce or to attack any rules, regulations, decisions or orders, any part thereof shall be found invalid the court shall proceed to enforce such portion thereof as may be valid if the same can be done.

(9) Practice, procedure and evidence in proceedings before Commission.

In all matters of practice and procedure, and all matters of evidence and the rules of evidence and all matters involving the effect of evidence in proceedings before the Commission under the provisions of this Article, and in proceedings by the said Commission to enforce its rates, rules, regulations, decisions, orders and requirements made hereunder, and in proceedings against the said Commission in relation to rates, rules, regulations, decisions, orders and requirements prescribed by it, all provisions of law now existing or which may from time to time be prescribed for observance in like cases arising under the law for the regulation of railroads, railroad companies and common carriers, shall govern and control.

(10) Judicial Powers of Commission.

The Commission shall, so far as the constitution of this State permits, exercise all such judicial powers as may be necessary to enable it to enforce or perform any duty, power or function conferred on it by this Article.

Sec. 7. (a) In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the railroad commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court, in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act.

Sec. 7. (b) No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hearing before the commission or any commissioner or examiner when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath have testified or

produced documentary evidence; *provided*, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any transportation company immunity of any kind. [Amended, Ch. 153, Stats. 1925, p. 302.]

(11) Rate of speed in operation of motor vehicles.

No Auto Transportation Company shall operate any motor vehicle on the public highways of this State at a speed in excess of the speed now permitted by the laws of this State, but motor vehicles used exclusively for carrying of passengers may be operated at any rate not exceeding forty-five (45) miles per hour.

(12) Departure from regular route in operation of motor vehicles.

An auto transportation company holding a Certificate of Public Convenience and Necessity as provided for in this Article may depart from the route described in such certificate if compelled to detour on account of the closing of roads, or for the purpose of transporting char-

tered or excursion parties to points not on such route, and not exclusively on a route seved by any other certificate holder, and may receive for such service compensation as may be agreed upon between the carrier and the party or parties so served.

(13) Every officer, agent or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provision of this Act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, or who fails to observe any regulation as to maximum speed of operation or maximum weight of load, of the Railroad Commission or who procures, aids, or abets any corporation or person in his failure to obey, observe or comply with any such order, maximum speed of operation, maximum weight of load, decision, rule, direction, demand, or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. [Section 7794 (2.) Compiled General Laws

Sec. 8. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the railroad commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

of Florida, 1930 Supplement.]

(14) Mileage Tax. Books and forms of account.

There shall be collected by the Comptroller of the State from every auto transportation company as herein defined to which has been granted a Certificate of Public Convenience and Necessity permitting it to engage in the transportation of passengers or freight, or both, a mileage tax of one-half cent per mile on all buses with a capacity of 10 passengers or less and a mileage tax of three-fourths cent per mile on all buses with a capacity of not more than 20 passengers nor less than 10 passengers and a mileage tax of one cent per mile on all buses of the capacity of more than 20 passengers; and a mileage tax of one cent per mile on all trucks with a loaded capacity of less than 5,500 lbs. and a tax of two cents per mile on all trucks with a loaded capacity of 5,500 lbs. or more coming within the terms of this Article, for every mile traveled by the motor vehicles of such auto transportation company over the public highways of this State. This tax shall be paid quarterly beginning October 1, 1929; Provided, that at the time of issuing said Certificate of

Public Convenience and Necessity and at the beginning of each calendar quarter thereafter the Comptroller of the State shall collect from each holder of such certificate the sum of Seventy-five Dollars, as an advance payment upon the mileage tax herein levied for the ensuing quarter which said amount shall at the end of the quarter be credited to said holder of such certificate and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller with the said holder of such certificate.

In order to ascertain the bus mileage of every passenger bus and the truck mileage of every freight truck traveled by the holders of certificates for such purpose the Comptroller of the State shall prescribe the books and forms of accounts to be kept by the said holder of such certificate and at the end of each current month the said holder of a certificate shall file with the Comptroller, and a duplicate thereof with the Commission, a statement verified by an officer, if the holder of such certificate is a corporation, or if the holder of such certificate is a person then by such person, showing the mileage made by said holder of such certificate during the said month: Provided, further, that the mile-

age tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax and except the motor vehicle license tax as now provided for in section 1285; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304. The books and records of all auto transportation companies shall be at all times open to inspection of the Comptroller of the State and of the Commission, or any agent by them appointed for such purpose, and if the said holder of such certificate shall fail to make the monthly reports herein prescribed to the Comptroller and to the Commission, or shall fail to keep said books and records as prescribed by said Comptroller of the State, then upon notice in writing to said holder of such certificate of such default or defaults and the failure of the said holder of such certificate within five days to make said statements or to keep said records properly the certificate shall be revoked by the Commission, but the Commission shall, if requested by the said holder of such certificate, order a hearing upon the question of the

revocation of such certificate. The Comptroller of the State shall keep a true and accurate list of all auto transportation companies to whom certificates shall be issued with the post office address of each.

(15) Comptroller to keep separate account of collections.

It shall be the duty of the Comptroller of the State to keep a separate account of all moneys collected under this Article and any and all moneys so collected after deducting the necessary expenses incurred by the Comptroller of the State in carrying out the provisions of this Article shall be paid to the State Treasurer monthly. The State Treasurer shall credit the Railroad Commission fund with five per cent (5%) of the moneys so collected and paid to him to cover the expenses of the administration of this Article by the said Commission, and shall distribute the balance as follows: To each county whose highway system is used as a part of the route authorized in the Certificate of Public Convenience and Necessity issued to any auto transportation company its part of said balance in the proportion that the bus mileage traveled over its highway system bear

to the entire bus mileage traveled by the motor vehicle of said auto transportation company; such amounts shall be quarterly remitted to the County Commissioners of each of said respective counties by warrant of the Comptroller on the State Treasurer, in like manner as other payments by State warrants are made, to be paid by the said County Commissioners to the bond trustees of the county bonds, to be used by said trustees to pay the interest on and provide a sinking fund to retire the county bonds issued for the purpose of constructing the State system or the county system of good roads within said county or to be used by said county commissioners for said purpose.

(16) Permission to employ clerks and inspectors.

The Commission shall employ such necessary clerks, inspectors and employees on such terms and conditions as said Commission shall deem advisable and necessary to carry out the provisions of this Article.

(17) Operation and effect of law.

Neither this Article nor any provision hereof shall apply or be construed to apply

Sec. 9. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this un-

to commerce with foreign nations or commerce among the several States of the union except insofar as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

ion, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress; *provided, however,* that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the Railroad Commission shall have the power to prescribe such reasonable, uniform and non-discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity. [Amended Ch. 254, Stats. 1925, p. 433.]

(18) Effect of partial invalidity of law.

If any section, sub-section, sentence, clause or phrase of this law is for any reason held unconstitutional such decision shall not affect the validity of the remaining portions of this law. In case the provisions of this law providing for the distribution among the counties of this state of the balance of the net proceeds of all moneys collected under this Article after the five per cent (5%) thereof has been credited to

Sec. 10. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

the Railroad Commission fund, is, for any reason declared or found to be invalid, then in that event such balance of such proceeds above described shall be paid into the State Road License Fund and shall be used for the construction and maintenance of State roads under the direction of the State Road Department.

(19) Rates fixed in tariffs on file to be adhered to.

No auto transportation company shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such company as specified in its tariffs filed with and approved by the Commission and in effect at the time; nor shall any such company refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such company shall directly or indirectly,

Sec. 6b. No transportation company subject to the provisions of this act shall, directly or indirectly, issue, give or tender any fare, ticket, free pass, or free or reduced rate transportation for passengers or freight between points within this state, except to such person or persons as common carriers under and in accordance with the provisions of the public utilities act, are permitted to issue such fare, ticket, free passes, or free or reduced transportation and except to officers or employees of transportation companies as defined under this act. [Added Ch. 840, States 1921, p. 1609.]

issue, give, tender, or honor any free fares except to its bona fide officers, agents, employees and members of their immediate families; provided, that auto transportation companies under the Article may exchange, free transportation within the limits of this Section.

(20) Number plates.

Distinguishing number plates shall be prescribed and furnished by the Commission, which plates shall be displayed at all times upon each motor vehicle authorized for operation under this Article, for which the Commission shall charge and each auto transportation company shall pay a fee of fifty cents each. Transfers of number plates from one vehicle to another are hereby prohibited. The fees derived from the issuance of such number plates shall be paid into the State Treasury to the credit of the Railroad Commission fund.

These sections in version of Act in Florida Compiled Laws.

Section 21. All laws and parts of law in conflict with the provisions of this Act be and the same are hereby repealed.

Sec. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. The provisions of an act entitled "An Act providing for the sale of

Section 22. This Act shall become effective on July 1st, 1929.

street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts (approved March 22, 1905; Stats. 1905, p. 777) "are declared not to apply to the use of highways for the kind of transportation herein regulated.

Sec. 6. No transportation company may issue any stock or stock certificate, or any bond, or any note or other evidence of indebtedness payable at a period of more than twelve months after the date thereof unless such transportation company, in addition to the other requirements of law, shall first have secured from the Railroad Commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that, in the opinion of the Railroad Commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order and that, except as otherwise permitted in the order in the case of bonds, notes and other evidences of indebtedness, such purpose or purposes are not, in whole or

in part, reasonably chargeable to operating expenses or to income. Such order may be made, in the discretion of the Railroad Commission, either with or without a public hearing. Except as in this section otherwise provided, the provisions of section fifty-two of the public utilities act referring to the purposes for which stocks and stock certificates, bonds, notes and other evidences of indebtedness, may be issued and the application of and the accounting for the proceeds thereof, the powers and duties of the Railroad Commission and the rights and duties of public utilities with reference thereto, the legal status of stocks and stock certificates and of bonds, notes and other evidences of indebtedness, issued without an order of the Railroad Commission then in effect, and the relationship of the State of California to such stocks and stock certificates, and such bonds, notes and other evidences of indebtedness, shall apply to and govern the issue of stocks and stock certificates, and of bonds, notes and other evidences of indebtedness, of transportation companies with the same force and effect as though section fifty-two of the public utilities act were restated in this section with the substitution of the words "transportation

company" for the words "public utility" and of the words "transportation companies" for the words "public utilities." The provisions of section fifty-seven of the public utilities act referring to fees to be charged and collected by the Railroad Commission for certificates authorizing the issue of bonds, notes or other evidences of indebtedness of public utilities shall apply to and govern authorizations by the Railroad Commission of the issue by transportation companies of bonds, notes or other evidences of indebtedness. [Amended, Ch. 280, Stats. 1919, p. 457.]